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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JESUS ENRIQUE PADILLA, on Habeas Corpus.	B214479 (Los Angeles County Super. Ct. No. KA037238)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. C. Edward Simpson, Judge. Petition denied.

Robert Franklin Howell for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Respondent.

In August 1998, after his second trial, the jury found petitioner Jesus Enrique Padilla ("petitioner") guilty on all charges: first degree murder and shooting at an occupied car. The jury also found gang and firearm allegations true.

In this petition for habeas corpus, petitioner argues he was deprived of his right to effective assistance of counsel because his attorney at the second trial (a) failed to present witnesses who had testified at the first trial and would have impeached the prosecution's two main witnesses, (b) failed to use investigative reports to impeach those same witnesses, (c) failed to challenge the alleged motive for the murder, and (d) failed to litigate effectively the issue of the shooter's car. We disagree and deny the petition.

Background

1. The Shooting

Sarah Rivera was 17 years old when she was shot and killed on November 10, 1994. That evening, Rivera rode in the front seat of a Chevrolet Blazer, sitting between her boyfriend Angel Perez, who was driving, and her friend Lorraine Northup, who was in the passenger seat. All three were members of the Bassett Grande gang. They had been partying and were on their way to buy more beer. Northup felt intoxicated. As the three drove down a residential street in Bassett, they noticed a beige car pull up behind them. Thinking friends were in the car, Perez slowed down and the other car pulled up beside them. As Perez leaned forward to turn down the car radio, someone in the other car fired a gun into and at the Blazer. One bullet knicked the beanie Perez wore on his head and struck Rivera in the face. She was pronounced dead at a local hospital that night.

No one knew who was in the beige car and petitioner (also known as Mousey) was not arrested for Rivera's murder until 1997, almost three years later.

2. Arrest and Trials

In December 1996, while serving time with the California Youth Authority for murder, petitioner's friend Marcus Chavez identified petitioner as the person who shot Rivera. In August 1997, Chavez's stepfather and fellow convicted felon (including a

child molestation conviction, among others) Dennis Romero also identified petitioner as the person who shot Rivera.

Soon after, petitioner was arrested and charged with Rivera's murder. At the time of his arrest, petitioner was a member of the North Whittier Locos gang ("NWL"), which was at war with the victims' gang, Bassett Grande. Petitioner went to trial in April 1998. The trial court declared a mistrial after the jury became hopelessly deadlocked, with eight jurors voting to convict and four jurors voting to acquit.

Petitioner was retried a few months later in August 1998. He retained Peter Osborn ("trial counsel") to represent him during the second trial. Trial counsel took a different approach than that taken by petitioner's first attorney. For example, in contrast with the prosecution's main witnesses (convicted felons Chavez and Romero), trial counsel decided to present the most credible witnesses he could find and whose background and character were not seriously blemished. As part of this strategy, trial counsel did not present witnesses who testified on behalf of petitioner at his first trial, but whom trial counsel considered less believable in light of gang affiliations. Trial counsel also decided to avoid testimony about a bar fight that allegedly led to Rivera's murder.

3. Evidence at Second Trial

The prosecution's key witnesses were Marcus Chavez and his stepfather Dennis Romero.

a. Marcus Chavez

At the time of the Rivera murder, Marcus Chavez was 14 years old. He and petitioner were "road dogs" (i.e., friends who stuck together) and NWL gang members. A month before the Rivera murder, Chavez murdered someone. He was on the lam for a couple months and, in December 1994, turned himself in and confessed to the murder he had committed. At the time of petitioner's second trial, Chavez was serving time for that murder. He decided to testify against his "road dog" because he (Chavez) had changed his life for the better and believed petitioner should take responsibility for his crime.

At trial, Chavez identified NWL gang members pictured in photographs, including petitioner, petitioner's mother (who was throwing gang signs), George Gonzales, and

David Salazar. Chavez explained that George Gonzales and petitioner were very close and that George's girlfriend (whom George later married) was Laura.

In early 1994, Laura told petitioner, petitioner's mother and Chavez that she had been beaten up at a bar in Bassett. Laura said she had been out with George's sister and they were throwing gang signs, which angered some other girls, who then beat her up. Laura knew one of the girls was named Sarah and was from Bassett. At the time this happened, George was incarcerated. He was released in mid-1994.

Chavez discussed what happened the night of Rivera's murder. Chavez was at fellow NWL gang member Ritchie Switzer's house. Switzer was known as Looney. That evening, petitioner drove his beige Oldsmobile to Switzer's house, took Chavez aside, and asked Chavez to help him kill Rivera. Chavez explained that petitioner wanted to kill Rivera because, not only was she from Bassett Grande, but she had beaten up his close friend George's girlfriend, Laura. Chavez said no and petitioner left in his car. Petitioner returned to Switzer's house later that night and again took Chavez aside, asking him to help kill Rivera. Chavez again said no and petitioner left. Still later that night, petitioner returned to Switzer's house and told Chavez he (petitioner) got a gun from George and "that it was done. It was over. They shot and killed Sarah."

On cross-examination, trial counsel read portions of Chavez's preliminary hearing testimony that conflicted with his trial testimony. For example, at the preliminary hearing, Chavez said he was at petitioner's house (not Switzer's house) when petitioner asked Chavez to come with him to kill Rivera. Chavez also testified at the preliminary hearing that petitioner confessed to killing Rivera about a week and a half after the murder, not the night of the murder. Chavez also admitted telling detectives that he did not go back to Switzer's house a third time the night of Rivera's murder. On redirect, however, Chavez explained that, about one or two weeks before Rivera's murder, petitioner asked Chavez to back up petitioner in killing Rivera. That conversation took place at petitioner's house. Chavez explained that petitioner had been talking about killing Rivera long before she was actually killed.

At trial, Chavez said that, although petitioner had been having problems with his car, it was working the night of Rivera's murder. In early December 1994, however, when Chavez turned himself in, he told detectives that petitioner's car was not working and (although Chavez's testimony was not clear on the issue) that the car might not have been working in October 1994 when Chavez committed his murder.

Chavez denied getting any deals from law enforcement in exchange for his testimony. On cross-examination, however, Chavez acknowledged that a Sheriff's detective had written a letter to the California Youth Authority parole board, but he said he did not expect any benefit for testifying.

b. Dennis Romero

Dennis Romero is Chavez's stepfather. He has been convicted of, among other felonies, burglary, child molestation, and assault with a deadly weapon. He has violated parole multiple times. At the time of petitioner's second trial, however, Romero was not on parole.

On the night of Rivera's murder, petitioner came to Romero's house (where Romero lived with his wife and stepson Chavez) looking for Chavez, but he was not there. Petitioner was driving a beige Cutlass. The next day, petitioner's stepfather Fernando Payan told Romero about the murder.

Romero himself was arrested on November 18, 1994 on an independent matter. Detectives interviewed him a few days after his arrest, at which time Romero told the detectives that his stepson Chavez had murdered someone the month before, in October 1994. When the detectives asked Romero about the Rivera murder, Romero said he had heard about it but did not know anything about it. He told the detectives the Rivera murder had not "come back to the area," but, at trial, Romero could not explain what he meant by that.

Romero also testified about a party petitioner's parents held at their house on July 4, 1996. At the time, Romero was on parole. He went to the party to get a gun from petitioner and stayed about 30 minutes. George Gonzales was also at the party. When Romero asked petitioner for a gun, petitioner turned to George and asked if he still had

the gun, saying "the gun I shot that bitch from Bassett with." Romero asked if petitioner was talking about Rivera and petitioner answered "Yeah, I wasted that bitch."

Romero did not report this to detectives until the summer of 1997 (a year later). He finally came forward because he had become a born-again Christian and "couldn't live with the fact knowing what [petitioner] did with that girl." On cross-examination, Romero explained that he first became a born-again Christian in 1991, when he got out of custody on child molestation charges. But, he "back slid" in 1993, when he violated his parole and returned to prison for a year. He was released in January 1994, only to violate parole again and return to prison in November 1994 for another year. On cross-examination, Romero also acknowledged that, if he were convicted of one more felony (such as felony possession of a handgun), he would face 25 years to life in prison. Despite this, he explained he wanted a gun for protection against the Mexican Mafia because he is a former member. After he couldn't find a gun at the July 4th party, he did not look elsewhere.

In April 1998, Romero was waiting at the district attorney's office to testify in this case. Rivera's boyfriend Angel Perez was also there waiting to testify. Romero and Perez did not know each other, but realized they were there for the same reason. According to Romero, Perez said he knew Mousey (i.e., petitioner) was "the one that did it," but, because Perez did not want to be a rat, he told the officers he ducked when he heard shots and did not see anything. Romero did not tell anyone about his encounter with Perez until August 1998. Romero believed he was not to talk about the trial while it was ongoing, although he gave no reason for waiting well-after the first trial had ended to come forward.

c. Other prosecution witnesses

Suzanne Cuskey. Chavez's girlfriend Suzanne Cuskey confirmed (with a few inconsistencies) Chavez's testimony about the night of Rivera's murder. Chavez was upset that night, but she did not know why. When she dropped him off at Switzer's house that night, she saw the back of a beige Regal or Cutlass in Switzer's driveway,

which she believed was petitioner's car. The parties stipulated that Cuskey was "convicted of misdemeanor shoplifting for a theft that occurred in 1996."

Angel Perez. When Rivera was shot, she was sitting next to her boyfriend Angel Perez as he was driving a Chevrolet Blazer. Perez was a Bassett Grande gang member. He testified that the shooter was in a beige Buick Regal with tinted windows and stock rims. Perez also described his April 1998 encounter with Romero at the district attorney's office. Perez contradicted Romero's testimony, saying he did not tell Romero that Mousey killed Rivera. Perez said he did not know who Mousey was.

Lorraine Northup. Bassett Grande gang member Lorraine Northup was sitting next to Rivera when Rivera was shot. At the time of trial, Northup was in custody for a parole violation and was reluctant to testify. She said she was "not good with cars" but believed the shooter was riding in a 2-door. She agreed that, at the first trial, she testified the car was beige and could have been a Buick Regal, but she was not sure.

Angela DeJesus. In addition to Perez and Northup, Angela DeJesus also witnessed the shooting. While looking out her kitchen window, DeJesus saw the Chevrolet Blazer and a beige car line up side-by-side on the street outside her home. She heard six or seven gun shots and saw the Blazer follow the beige car speeding down the street. She said the beige car "looked like an Oldsmobile" On cross-examination, trial counsel asked DeJesus if she had earlier told him the car was a Buick, and she responded "I don't think so."

Deputy Raffa. Sheriff's Deputy Joe Raffa testified that, as part of his investigation into the October 1994 murder to which Chavez later confessed, Deputy Raffa and another sheriff's deputy searched petitioner's home during the day of November 10, 1994 (i.e., the day of Rivera's murder). At that time, he saw a light-colored, 2-door Buick Regal or Chevrolet Monte Carlo or "that type of a car" in petitioner's garage with clothes on the trunk. He said the model year 1977 through 1985 Regal, Monte Carlo and Oldsmobile Cutlass generally look alike and are all based on the same General Motors body type.

d. Defense witnesses

Ruth Noriega. At the time of Rivera's murder, petitioner's girlfriend was Angela Aviles, who, a few months earlier, had given birth to petitioner's son. Aviles's mother Ruth Noriega testified on petitioner's behalf. Noriega had no felony convictions and worked as a human resources manager. Although she is close with petitioner, she said she was telling the truth and that, if petitioner committed the crime, he should pay the price.

Noriega presented an alibi for petitioner. She testified that, in November 1997, against her wishes, petitioner was living with her daughter at their home. She did not want petitioner there because he and her daughter were not married. Her daughter wanted petitioner to stay with them because his car was not working and she had to drive him around in her car which had been overheating. Noriega also remembered November 1994 (including the night of Rivera's murder) because they were preparing for her grandson's (petitioner's son's) November 13, 1994 baptism. Petitioner stayed with them from either Monday or Tuesday, for the rest of the week (November 10th, the night of Rivera's murder, was a Thursday), while they prepared for the baptism.

When Noriega heard petitioner had been arrested, she called her ex-brother-in-law, who worked for the Sheriff's Department. He told her to get an attorney. At that time, she did not know why petitioner had been arrested or when the alleged crime had occurred. She was concerned about her daughter. Although her ex-brother-in-law told her that if she had any alibi information she should speak with the detectives investigating, she never did.

Frank Fernandez. Noriega's husband Frank Fernandez also testified on petitioner's behalf, supporting Noriega's alibi testimony. At the time of trial, Fernandez had been working for the same company for 13 years and had no felony convictions. He remembered the relevant week in November 1994 (including the night of Rivera's murder) because they were preparing for their grandson's (petitioner's son's) baptism. Petitioner stayed at their home helping with the baby and preparing for the baptism. Fernandez said Noriega and her daughter fought over whether petitioner could stay with

them. He said that was the only time petitioner stayed with them and that petitioner never left the house. Fernandez said petitioner did not have his car that week so Noriega's daughter drove petitioner around. She used Fernandez's car because her car kept overheating.

Fernando Payan. Petitioner's stepfather Fernando Payan testified on petitioner's behalf. Payan had never been convicted of a crime and had been a contractor for a moving company for 10 years. He knew petitioner was a gang member.

Payan had hired Romero to help with moving jobs on an on-call basis for about four months. But Payan "phased him out" because Romero was caught looking through drawers on a job. He also said Romero had "disrespected" Payan's house during a 1996 Mother's Day party, which meant Romero could not return to the Payan house and Romero never did. Payan said Romero was not at the 1996 July 4th party.

Payan also said that, on December 2, 1997, he was at his mother's house when Romero came by and said he knew petitioner was not involved in the Rivera murder and that he would testify to that. After that encounter, however, Romero reported to the Sheriff's Department that Payan had threatened him. On cross-examination Payan was asked why—after Payan had fired Romero and Romero had disrespected the Payan house—he would welcome Romero's presence at his mother's house in December 1997. Payan distinguished disrespecting his house and disrespecting him. He denied knowing NWL hand gestures and that most of the people at his 1996 July 4th party were NWL gang members.

Celia Payan. Payan's mother (petitioner's grandmother) testified on petitioner's behalf. She said that, on December 2, 1997, Payan came to take her to deposit her pension and, as they were walking to the car, Romero came by and spoke with Payan. Romero told Payan that he knew "for a fact that Jessie didn't do the shooting. I'll testify in favor of him." On cross-examination, she said that, although she had this information that could help her grandson, she did not call the Sheriff's Department.

George Hurtado. Hurtado worked for LADWP for about 14 years and had no felony convictions. He said he would not risk losing his job and would not lie. His son was a NWL gang member.

Hurtado used to be employed full-time as an auto repairman and auto repair remained a hobby. He said that, at the time of the Rivera murder, he was doing a valve job on petitioner's 1983 Oldsmobile Cutlass. Petitioner had his car towed to Hurtado's yard, where the car stayed for about two weeks. Hurtado remembered the car being in his yard at the time of the murder because his son told him there was a rumor that petitioner had murdered someone using that car.

On cross-examination, he said he did not come forward with this information until April 1998, when he was subpoenaed. He had no receipts for the work he did on petitioner's car. And he said model years 1979 through 1983 Chevrolet Monte Carlo, Buick Regal and Oldsmobile Cutlass had the same body type.

Raymond Duran. Duran worked at his son's body shop and testified that the 1983 Buick Regal, Chevrolet Monte Carlo and Oldsmobile Cutlass were "more or less" the same body type, although he also said he could not keep track of all the different cars.

4. Appeal and Petitions for Writ of Habeas Corpus[1]

As is evident, trial counsel's strategy on retrial was unsuccessful and the jury found petitioner guilty of all charges and found the gang and firearm allegations true. The trial court sentenced petitioner to 30 years to life in prison. Petitioner appealed his conviction to this court and petitioned the Supreme Court for review, both of which were unsuccessful.

In 2007, petitioner filed his first petition for writ of habeas corpus, claiming that he was denied his right to effective assistance of counsel and that the prosecution failed to disclose exculpatory evidence. We issued a notice to show cause returnable in the trial

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[1] Although procedurally improper (see Cal. Rules of Court, rule 8.252(a)), we grant petitioner's request for judicial notice of the record and our opinion in his prior appeal (Case No. B128121), as well as the exhibits filed with his prior petition for writ of habeas corpus (Case No. B196243).

court. The trial court held a hearing in January 2008, during which trial counsel testified as to his trial strategies (to the extent he could remember them 10 years later). The court concluded trial counsel was not deficient and, although ultimately unsuccessful, had a reasonable trial strategy. The court also noted that petitioner's claims could and should have been raised in his earlier appeal. The trial court denied the petition.

More than a year later, in March 2009, petitioner filed the instant petition for writ of habeas corpus, raising ineffective assistance of counsel arguments similar to those raised in his first habeas petition. In particular, here, petitioner claims trial counsel: (a) failed to present witnesses who had testified at the first trial and would have impeached the prosecution's two main witnesses, convicted felons Chavez and Romero, (b) failed to use investigative reports to impeach those same witnesses, (c) failed to challenge the alleged motive for the killing, and (d) failed to litigate effectively the issue of the shooter's car.

Discussion

1. Standard of Review

Petitioner bears the burden of establishing the judgment under which he is restrained is invalid. "'To do so, he . . . must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

"Where, as here, the superior court has denied habeas corpus relief after an evidentiary hearing (viz., the hearing held on the order to show cause ordered in response to petitioner's first habeas corpus petition) and a new petition for habeas corpus is thereafter presented to an appellate court based upon the transcript of the evidentiary proceedings conducted in the superior court, 'the appellate court is not bound by the factual determinations [made below] but, rather, independently evaluates the evidence and makes its own factual determinations.' [Citation.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 249.) But, "[w]hile our review of the record is independent and 'we may reach a different conclusion on an independent examination of the evidence . . . even

where the evidence is conflicting' [citation], any factual determinations made below 'are entitled to great weight . . . when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the [superior court] heard and observed.' [Citations.]" (*Ibid.*) We independently review any conclusions of law or resolution of mixed questions of fact and law. (*In re Hamilton* (1999) 20 Cal.4th 273, 296-297.)

2. Ineffective Assistance of Counsel

A successful "claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668; *People v. Ledesma* (1987) 43 Cal.3d 171.)" (*People v. Garrison* (1989) 47 Cal.3d 746, 786.) Thus, petitioner must demonstrate "'(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner.'" (*In re Jones* (1996) 13 Cal.4th 552, 561.)

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any

given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.)

In general, we "reverse convictions on the ground of inadequate assistance of counsel only when the record affirmatively reveals that counsel had no rational tactical purpose for an allegedly incompetent act or omission. [Citation.] [We] will not second-guess trial counsel's reasonable tactical decisions. [Citation.]" (*People v. Garrison*, *supra*, 47 Cal.3d at pp. 783-784.) Trial counsel is given wide latitude and discretion in the area of tactics and strategy, but the exercise of that discretion must be founded upon reasonable investigation and preparation, and it must be reasonable and informed in light of the facts and options reasonably apparent to counsel at the time of trial. (*In re Jones*, *supra*, 13 Cal.4th at pp. 561, 564-565.)

3. Application

a. Trial counsel's strategy

At the evidentiary hearing, trial counsel explained that his strategy was to establish that, on the night of the murder, petitioner's car was not working and petitioner was at his girlfriend's house preparing for their son's baptism. He also attempted to highlight why the jury should not believe the prosecution's main witnesses—Chavez and Romero—by pointing out (i) they were convicted felons, (ii) Chavez may have had some motivation to testify against petitioner because a letter was written to the California Youth Authority parole board on his behalf, and (iii) Romero was in and out of jail most of his adult life.

In contrast to Chavez and Romero, trial counsel sought to call upstanding and credible witnesses to testify on petitioner's behalf. None of the defense witnesses were convicted felons, and most appeared to have a steady employment history. Trial counsel purposely avoided witnesses who were gang members. Trial counsel also sought to downplay or avoid mentioning the fight that allegedly led to Rivera's murder. He believed that, at the first trial, there was too much testimony about the fight and that much of that testimony "showed a closeness between the parties." He noted the "prosecution bears the burden of proof on a case, and the less information you have in a

file . . . generally speaking, other things being equal, sometimes the better off you are." At the time of trial, trial counsel believed he made reasonable tactical decisions.

In his closing statement to the jury, trial counsel contrasted the prosecution's key witnesses with the defense witnesses. "A conscious decision was made on [petitioner's] behalf not to put on other gang members. . . . We weren't going to parade them up here to defend [petitioner]. The prosecution bears the burden of proof of every element of the offense beyond a reasonable doubt. If there were witnesses out there who were going to corroborate what Mr. Chavez and what Mr. Romero said, it was their obligation to bring them in. [¶] And I ask you how much credence would you have given to a witness tattooed from head to toe who had gone up and said, 'well, this didn't happen, that didn't happen.' I think it would have been given, quite frankly, little weight. Therefore, we made a conscious effort to bring in the best witnesses we could, the most credible witnesses we could. [¶] . . . [¶] This whole case is Marcus Chavez and Dennis Romero's testimony and that is the whole case. If you don't believe them, if you say, listen, 'we can't believe what Dennis Romero says beyond a reasonable doubt and we can't believe what Marcus [Chavez] says beyond a reasonable doubt,' there's no case. You have to believe beyond a reasonable doubt that they're telling the truth because if you don't, the logical underpinnings of this case collapse, [and] everything motive, fight, all that stuff—it just cracks of its own weight. [¶] . . . [¶] You're going to have to find that the witnesses I put on are liars and that Dennis Romero and Marcus Chavez are telling you the truth and you're going to have to find that conclusion beyond a reasonable doubt . . . . I challenge you to find that Dennis Romero[and] Marcus Chavez have ever told the truth beyond a reasonable doubt about anything."

b. Failure to impeach Chavez and Romero with witnesses who testified at the first trial

Petitioner argues trial counsel was ineffective because he failed to call witnesses who testified at the first trial and would have impeached the prosecution's key witnesses, Chavez and Romero. Those missing witnesses were: Richard Switzer, George Gonzales, Laura Gonzales, David Salazar and petitioner. At the evidentiary hearing below, the

parties stipulated that, had those witnesses testified at the second trial, their testimony would have been substantively the same as their testimony at the first trial. We address each witness in turn.

Richard Switzer. At the first trial, Switzer said petitioner had never been to his house and Chavez had never been to his house at night. This testimony would have contradicted Chavez's testimony that, on the night of the murder, he was at Switzer's house and that petitioner came by not only to ask Chavez to help in the murder, but also later to tell him that Rivera had been killed.

Trial counsel did not call Switzer to testify because, like petitioner, Switzer was a NWL gang member and because trial counsel had heard Switzer was nervous and tenuous at the first trial. Trial counsel also noted that he called other witnesses who were not gang members or convicted felons for the purpose of establishing that petitioner was not at Switzer's house the night of the murder, including his girlfriend's parents (both of whom testified petitioner was at *their* house at the time) and Hurtado (who testified he was working on petitioner's car at the time). We conclude trial counsel had a rational tactical purpose for not calling Switzer to testify.

George Gonzales. At the first trial, George Gonzales testified he never spoke with petitioner about a shooting. He also said that he and his wife Laura were at the 1996 July 4th party, but Romero was not there. Gonzales said he had never met Romero and had never spoken with him. This testimony would have contradicted Romero's testimony that he was at the July 4th party and, while there, heard petitioner admit to killing Rivera and say that the murder weapon was a gun borrowed from George Gonzales.

Trial counsel did not call George Gonzales to testify because he was a NWL gang member, close friend of petitioner (in fact, he is the godfather of petitioner's son), convicted felon, and would have confirmed the fight that allegedly led to Rivera's murder. Moreover, Fernando Payan testified that Romero was not at the July 4th party and, as previously noted, other witnesses who were not gang members or convicted felons testified that petitioner was with them the night of the murder and that his car was not working. Trial counsel believed George Gonzales's "testimony would hurt more than

help." We conclude trial counsel had a rational tactical purpose for not calling George Gonzales.

Laura Gonzales. At the first trial, Laura Gonzales testified that, although she had been in a fight, she did not know who her attackers were other than that they were female. She also said she was at the July 4th party, but, contrary to petitioner's claims here, she did not say whether she saw Romero at that party. Thus, Laura's testimony could have contradicted Chavez's testimony that Laura knew Rivera was one of her attackers.

Trial counsel did not call Laura Gonzales to testify for the same reasons he did not call her husband George Gonzales. She was a NWL gang member, had a close relationship with petitioner, and obviously knew about the fight that allegedly led to Rivera's murder. In addition, other witnesses who were not gang members or convicted felons testified that petitioner was with them the night of the murder and that his car was not working that night. We conclude trial counsel had a rational tactical purpose for not calling Laura Gonzales.

David Salazar. At the first trial, Salazar testified he was at the July 4th party all day and did not see Romero there. This testimony would have contradicted Romero's testimony that he was at the July 4th party.

Trial counsel did not call Salazar to testify because he was a NWL gang member and because other witnesses testified that petitioner was with them the night of the murder and that his car was not working at that time. Moreover, Payan testified Romero was not at the July 4th party. We conclude trial counsel had a rational tactical purpose for not calling Salazar.

Petitioner. At the first trial, petitioner testified he was not at Switzer's house the night of the murder, but was staying with his girlfriend at the time. He also said he was at the July 4th party and did not see Romero there and that Romero never asked him for a gun. Petitioner's testimony would have contradicted both Chavez's testimony and Romero's testimony.

Although trial counsel did not conduct a mock examination of petitioner, trial counsel asked petitioner pointed questions and decided not to have him testify at the second trial. Given petitioner's obvious bias, trial counsel's questioning of petitioner, and the testimony offered by arguably more credible witnesses, we conclude it was reasonable for trial counsel not to call petitioner to testify on his own behalf.

Angel Perez. Petitioner also claims trial counsel was ineffective because he failed to recall Angel Perez to rebut Romero's testimony that, while waiting at the district attorney's office, Perez told Romero he knew petitioner was the shooter. But, petitioner concedes no evidence on this issue was missing, as Perez testified he never said that to Romero. Rather, petitioner claims trial counsel should have recalled Perez on this issue because the jury could have been confused since Perez testified before Romero during the prosecution's case. We conclude this argument lacks merit.

c. Failure to impeach Chavez and Romero with Sherriff's reports

Petitioner argues trial counsel was ineffective both because he failed to use a 1994 Sheriff's report to impeach Chavez and Romero and because he similarly failed to use a 1996 Sheriff's report to impeach Chavez.

1994 Report. In late-November 1994 (shortly after Rivera's murder), Romero was arrested for allegedly sexually molesting his stepdaughter. He denied the charges and told detectives that his wife and stepdaughter falsely accused him because he had threatened turning Chavez (her son) in for serious crimes. He told the detectives Chavez was "involved in at least two murders."

The trial court denied trial counsel's motion to use the 1994 report to impeach Romero by showing that, in addition to his other felony convictions, he had been arrested soon after the Rivera murder for molestation of his stepdaughter, which arrest could have motivated him to cooperate with detectives in this case. The court permitted trial counsel to cross-examine Romero only on the fact that he was arrested in November 1994 on a parole violation. Trial counsel was not permitted to delve into the details of that arrest. This court affirmed the trial court's ruling on that issue in Case No. B128121.

Nonetheless, petitioner argues trial counsel inadequately represented petitioner because, when trial counsel made his motion with respect to the 1994 report, he failed to point out Romero's statement that Chavez was "involved in at least two murders." According to petitioner, this statement establishes that Romero believed Chavez (and not petitioner) killed Rivera and that, if Chavez was the killer, Chavez would have had a reason to lie. We are not persuaded.

Contrary to petitioner's position, the 1994 report does not show that Romero believed Chavez murdered Rivera. The report states only that Romero believed Chavez was "involved in" at least two unidentified murders. As the trial court stated, it would be a "stretch" to interpret "involved in" as "was the killer." Indeed, the transcript of Romero's November 1994 jailhouse interview with detectives reveals that he distinguished between who was "involved with" and who "committed" the murder to which Chavez ultimately confessed. Romero unequivocally implicated Chavez as the perpetrator of the murder to which Chavez later confessed. In that same interview, however, when asked about the Rivera murder, Romero did not implicate anyone. He said he had heard about the murder, but did not know anything about it and that "it didn't come back to the area at all" (a statement he could not explain on cross-examination at trial). Moreover, trial counsel explained he investigated whether Chavez was involved in the Rivera murder and there's no indication he discovered sufficient evidence tying Chavez to that murder.

1996 Report. Petitioner contends trial counsel could have impeached Chavez's testimony that petitioner told him about the fight between Laura Gonzales and other girls, which allegedly led to Rivera's murder. In December 1996, Chavez spoke with detectives about the Rivera murder. Chavez told the detectives Laura Gonzales (not petitioner) told him about the fight she had been in. But, that statement is consistent with Chavez's testimony at trial. At the second trial, Chavez said Laura told him about the fight, and petitioner seems to understand this as it is reflected in his petition. Thus, contrary to petitioner's position, the 1996 report would not have impeached Chavez's testimony on that issue.

Petitioner also claims trial counsel could have used the 1996 report to impeach Chavez's description of events on the night of the murder and how he claimed to have learned petitioner was the killer. For example, at trial, Chavez stated he was at Switzer's house when petitioner came over saying he had killed Rivera—i.e., Chavez testified *petitioner* told Chavez he had killed Rivera. But, the 1996 report reflects that Chavez told detectives that *other people* told him about the murder and that he was rumored to have been the shooter. He also told detectives he learned from others that petitioner had returned to Switzer's house the night of the murder and was trying to hide a gun. We are not persuaded.

Contrary to petitioner's claim, although trial counsel did not dwell on the issue, he used the 1996 report to impeach Chavez's testimony that he had been at Switzer's house when petitioner allegedly returned after killing Rivera. In particular, trial counsel pointed out, and Chavez agreed, he had told detectives that, on the night of Rivera's murder, he had not gone back to Switzer's house a third time. Thus, Chavez admitted that his statement to the detectives conflicted with his trial testimony concerning when he was at Switzer's house the night of the murder. In addition, on both direct and cross-examination, Chavez's girlfriend Suzanne Cuskey testified she did not remember driving Chavez to Switzer's house a third time on the night of Rivera's murder—i.e., when petitioner showed up at Switzer's house saying he had killed Rivera.

Trial counsel also used Chavez's preliminary hearing testimony to further impeach his trial testimony on these issues. In particular, trial counsel noted, and Chavez agreed, that he had testified at the preliminary hearing he was at petitioner's house when petitioner asked Chavez to help kill Rivera. Trial counsel read portions of the preliminary hearing transcript into the record so that the jury heard Chavez's prior testimony (i) that he was at petitioner's house when petitioner asked Chavez to help kill Rivera (although, at trial, Chavez said he was at Switzer's house when petitioner asked for help), and (ii) that petitioner told Chavez about a week and a half after the murder that petitioner had killed Rivera (although, at trial, Chavez said petitioner admitted to killing

Rivera the same night while Chavez and petitioner were both at Switzer's house). Moreover, the 1996 report reflects that petitioner admitted killing Rivera to Chavez.

d. Failure to challenge petitioner's alleged motive for the murder

Petitioner claims trial counsel was ineffective because he did not challenge petitioner's alleged motive to kill Rivera. According to the prosecution, petitioner killed Rivera because petitioner knew Rivera had "beat up" Laura Gonzales, the girlfriend (and later wife) of one of petitioner's close friends and godfather of his son. Chavez's testimony supported this theory. Petitioner asserts trial counsel should have challenged this alleged motive by impeaching Chavez through the testimony of Switzer and Laura Gonzales. As explained above, however, we conclude trial counsel had a rational tactical purpose in not calling either Switzer or Laura Gonzales to testify and other testimony impeached that of Chavez. In particular, trial counsel used Chavez's preliminary hearing testimony to show he made conflicting statements with respect to when petitioner asked for help in killing Rivera and when petitioner told Chavez about killing Rivera. Trial counsel also used the 1996 report to demonstrate Chavez's trial testimony was not entirely consistent with statements he made to detectives about when petitioner told Chavez about Rivera's murder. Also, in contrast to Chavez's testimony, alibi witnesses Ruth Noriega and Frank Fernandez said petitioner was at their home the night of Rivera's murder, and George Hurtado said petitioner's car was in his yard the night of the murder.

Petitioner also claims trial counsel was ineffective because he failed to realize the alleged motive did not make sense given Rivera's position in the car when she was killed (she was sitting between Perez and Northup), that the shot came from their immediate left and that Perez would have been hit had he not happened to lean forward to adjust the radio. At the evidentiary hearing, trial counsel stated he had not thought of the possibility that Rivera was not the intended target of the shooting. We are not persuaded by this argument. The 1996 report discussed above notes that Chavez explained to the detectives that petitioner planned to "shoot and kill Sarah Rivera and whoever was with her that night." Thus, even assuming trial counsel was dilatory in not challenging the alleged motive in light of Rivera's position in the car, petitioner cannot show resulting prejudice

because the prosecution could have used the 1996 report (which petitioner himself argues trial counsel could and should have used more) to rebut any such attempt.

e. Failure to litigate effectively the issue of the shooter's car

Petitioner claims trial counsel was ineffective because, although he recognized that the identification of the shooter's car was a critical issue, he failed to litigate that issue adequately. We do not agree.

It was undisputed that petitioner's car at the time of Rivera's murder was a beige, 1983 Oldsmobile Cutlass with tinted windows. The witnesses were not consistent, however, with respect to the make of the shooter's car. Perez testified unequivocally that the shooter's car was a beige Buick Regal with tinted windows. Northup testified that it could have been a Buick Regal, but she was not sure and was "not good with cars," not to mention she was intoxicated at the time. DeJesus testified the car looked like an Oldsmobile, but she was not sure and she did not remember telling trial counsel it was a Buick. Three witnesses testified that the 1983 Buick Regal and the 1983 Oldsmobile Cutlass have the same body type and generally look alike. Given this evidence on retrial, trial counsel was not ineffective for (i) failing to point out that, at the first trial, Northup said the car was a Buick, and (ii) failing to question DeJesus further on a supposed statement she made to trial counsel prior to trial that the car was a Buick.

Finally, with respect to the issue of the shooter's car, petitioner argues trial counsel was ineffective because he failed to object when the prosecutor flagrantly mischaracterized the evidence. In closing, the prosecutor inaccurately stated the shooter's car had Oldsmobile hubcaps, when no one had said that at trial. Just a few lines before this inaccurate Oldsmobile comment, however, the prosecutor accurately and correctly said Perez described the car as a Buick Regal. Even assuming trial counsel erred in not objecting to the prosecutor's misstatement, however, petitioner cannot show resulting prejudice because the jury was properly instructed that statements made by the attorneys are not evidence.

Disposition

The petition is denied.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.